Introduced by Senator Kuehl

February 20, 2003

An act to amend Section 1798.24b of the Civil Code, and to amend Sections 4514.3, 4900, 4901, 4902, 4903, 4905, and 5328.06 of the Welfare and Institutions Code, relating to public social services.

LEGISLATIVE COUNSEL'S DIGEST

SB 577, as introduced, Kuehl. Protection and advocacy agencies. Existing law prescribes, in accordance with federal law, the powers of the protective and advocacy agency, which is a private, nonprofit corporation, charged with protecting and advocating for the rights of persons with developmental disabilities and mental disorders.

This bill would expand the authority of the agency to protect and advocate for the rights of persons with disabilities, as defined.

Under existing law, a protection and advocacy agency's powers include the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of the rights of persons with developmental disabilities and persons with mental illness, to provide information and referral to programs and services addressing the needs of persons with developmental disabilities and persons with mental illness, and to investigate any incident of abuse or neglect of persons with developmental disabilities or persons with mental illness if the complaints are reported to the protection and advocacy agency or if probable cause exists to believe that abuse or neglect has occurred.

This bill would make changes in definitions used in these provisions and would define additional terms.

This bill would also expand and define the protection and advocacy agency's right to access to public or private facilities and programs and to recipients.

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This bill would also expand and define the protections and advocacy agency's right of access to records of persons with disabilities.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1798.24b of the Civil Code is amended 2 to read:
- 1798.24b. (a) Notwithstanding Section 1798.24, except the last-paragraph subdivision thereof, information may be disclosed to the protection and advocacy agency designated by the Governor in this state pursuant to federal law to protect and advocate *for* the rights of persons with developmental disabilities and persons with mental illness people with disabilities, as described in Division 4.7 (commencing with Section 4900) of the Welfare and Institutions Code.
 - (b) Information that may be disclosed pursuant to this section includes all of the following information:
 - (1) Name.
- 14 (2) Address.

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- (3) Telephone number.
- (4) Any other information necessary to identify that person whose consent is necessary for either of the following purposes:
- (A) To enable the protection and advocacy agency to exercise its authority and investigate incidents of abuse or neglect of persons with developmental disabilities or persons with mental illness-people with disabilities.
- (B) To obtain access to records pursuant to Section 4903 of the Welfare and Institutions Code.
- SEC. 2. Section 4514.3 of the Welfare and Institutions Code is amended to read:
- is amended to read:
 4514.3. (a) Notwithstanding Section 4514, information and
- records may be disclosed to the protection and advocacy agency
 designated by the Governor in this state to fulfill the requirements
- 28 designated by the Governor in this state to fulfill the requirements 29 and assurances of the federal Developmental Disabilities
- 30 Assistance and Bill of Rights Act *of 2000*, contained in Chapter 75
- 31 144 (commencing with Section 6000) 15001) of Title 42 of the
- 32 United States Code, for the protection and advocacy of the rights

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of persons with developmental disabilities, as defined in Section 6001(5) 15002(8) of Title 42 of the United States Code.

- (b) Access to information and records to which subdivision (a) applies shall be in accord with Division 4.7 (commencing with Section 4900).
- SEC. 3. Section 4900 of the Welfare and Institutions Code is amended to read:
- 4900. (a) The definitions contained in this section shall govern the construction of this division, unless the context requires otherwise.
- (b) "Abuse" means any an act, or failure to act, which act a person performed, or failed to perform, knowingly, recklessly, or intentionally, and caused, or may have caused, injury or death to a person with a developmental, mental, or other disability. Abuse includes, but is not limited to, verbal, nonverbal, mental, or emotional harassment, rape or any other sexual assault, striking, the use of excessive force when placing a person in bodily restraints, the use of any bodily or chemical restraint that is not in compliance with federal or state laws or regulations, or any other practice that is likely to cause immediate physical or psychological harm, or likely to result in long-term harm, if the practice continues. Abuse includes an act or failure to act that would constitute abuse as that term is defined in subdivision (g) of Section 15610.07 of the Penal Code.
- (c) "Developmental disability" means the same as defined in Section 6001(5) of Title 42 of the United States Code "Complaint" means, but is not limited to, a report or communication, whether formal, informal, written, or oral, received by the protection and advocacy agency, including, but not limited to, a media account, a newspaper article, or a telephone call, including an anonymous call, from any source, alleging abuse, neglect, injury, or death of a person with a disability.
- (d) "Disability" means a developmental disability, as defined in Section 15002(8) of Title 42 of the United States Code, a mental illness, as defined in Section 10802(4) of Title 42 of the United States Code, a disability within the meaning of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.), as defined in Section 12102(2) of Title 42 of the United States Code, or a disability within the meaning of the California Fair Employment

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and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), as defined in subdivision (i) or (k) of Section 12926 of the Government Code.

(e) "Facility" or "program" means any a public or private facility or program providing services, support, care, or treatment to persons with developmental disabilities or persons with mental illness persons with disabilities, even if only on an as-needed basis or under contractual arrangement. "Facility" or "program" includes, but is not limited to, a hospital, long-term health care facility, a community living arrangement for people with disabilities, including a group home, a board and care home, an individual residence or apartment, a day program, a juvenile detention facility, a homeless shelter, a jail, or a prison, including all general areas, as well as special, mental health, or forensic units. The term includes any facility licensed under Division 2 (commencing with Section 1200) of the Health and Safety Code and any facility that is unlicensed but is not exempt from licensure. The term also includes a public or private schools and school or other institutions or programs institution or program providing education, training, habilitation, therapeutic, or residential services to persons with developmental disabilities or persons with mental illness with disabilities.

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(f) "Legal guardian," "conservator," "legal representative," mean a person appointed and regularly reviewed by a state court or agency empowered under state law to appoint and review the legal guardian, conservator, or legal representative, as appropriate, which person has the legal authority to make all decisions on behalf of an individual with a disability. These terms include the parent of a minor who has legal custody of the minor. These terms do not include a person acting solely as a representative payee, a person acting solely to handle financial matters, an attorney or other person acting on behalf of an individual with a disability solely in individual legal matters, or an official or his or her designee who is responsible for the provision of treatment or services to an individual with a disability.

(g) "Neglect" means a negligent act, or omission to act, by an individual responsible for providing care, treatment, or services, which caused, or may have caused, injury or death to an individual

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with a disability, or which placed an individual with a disability at risk of injury or death, including, but not limited to, an act or omission such as the failure to establish or carry out an appropriate individual program plan, treatment plan, or discharge plan of an individual with a disability, failure to provide adequate nutrition, clothing, or health care to an individual with a disability, or failure to provide a safe environment for an individual with a disability. Failure to provide a safe environment for an individual with a disability includes, but is not limited to, the failure to maintain an adequate number of trained staff. Neglect includes, 10 but is not limited to, any act or failure to act that would constitute 12 neglect as that term is defined in subdivision $\frac{d}{d}$ (b) of Section 15610 15610.07 of the Welfare and Institutions Code or Section 13 14 11165.2 of the Penal Code.

(f) "Persons with mental illness" means the same as mentally 16 ill individuals, as defined in Section 10802(3) of Title 42 of the **United States Code.**

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- (h) "Probable cause" to believe that an individual has been subject to abuse or neglect, or is at significant risk of being subjected to abuse or neglect, exists when the protection and advocacy agency determines that it is objectively reasonable for a person to entertain such a belief, based upon facts that could cause a reasonable person in a like position, drawing when appropriate upon his or her training and experience, to suspect abuse or neglect.
- (h) that belief. The individual making a probable cause determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions, or problems that are usually associated with abuse or neglect. Information supporting a probable cause determination may result from monitoring or other activities, including, but not limited to, media reports and newspaper articles.
- (i) "Protection and advocacy agency" means the private nonprofit corporation designated by the Governor in this state pursuant to federal law for the protection and advocacy of the rights of persons with disabilities, including the following persons: following:

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(1) Persons People with developmental disabilities, as authorized under the federal Developmental Disabilities Assistance and Bill of Rights Act, as amended, of 2000, contained in Chapter 75 144 (commencing with Section 6000) 15001) of Title 42 of the United States Code.

- (2) Persons with mental illness, including mentally ill individuals *People with mental illness*, as authorized under the federal Protection and Advocacy for Mentally Ill Individuals *Amendments* Act of 1986, as amended 1991, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code.
- (3) People with disabilities within the meaning of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.) as defined in Section 12102(2) of Title 42 of the United States Code, who do not have a developmental disability as defined in Section 15002(8) of Title 42 of the United States Code, people with a mental illness as defined in Section 10802(4) of Title 42 of the United States Code, and who are receiving services under the federal Protection and Advocacy of Individual Rights Act as defined in Section 794e of Title 29 of the United States Code, or people with a disability within the meaning of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), as defined in subdivision (i) or (k) of Section 12926 of the Government Code.
- SEC. 4. Section 4901 of the Welfare and Institutions Code is amended to read:
- 4901. (a) The protection and advocacy agency, for purposes of this division, shall be a private nonprofit corporation and shall meet all of the requirements of federal law applicable to protection and advocacy systems, including, but not limited to, the requirement that it establish a grievance procedure for clients or prospective clients of the system to ensure that persons with developmental disabilities and persons with mental illness people with disabilities have full access to services of the system.
- (b) State officers and employees, in taking any action relating to the protection and advocacy agency, shall meet the requirements of federal law applicable to protection and advocacy systems.
- 38 (c) The authority of the protection and advocacy agency set 39 forth in this division shall not diminish the authority of the 40 protection and advocacy agency under federal statutes pertaining

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to the authority of protection and advocacy systems, or under federal rules and regulations adopted in implementation of those statutes.

- SEC. 5. Section 4902 of the Welfare and Institutions Code is amended to read:
- 4902. (a) The protection and advocacy agency, in protecting and advocating *for* the rights of persons who have developmental disabilities and persons with mental illness—people with disabilities, pursuant to the federal mandate, may do all of the following:
- (1) Investigate any incident of abuse and or neglect of persons with developmental disabilities and persons with mental illness any person with a disability if the incident is reported to the protection and advocacy agency or if the protection and advocacy agency determines there is probable cause to believe the incident abuse or neglect occurred. This authority shall include reasonable access to the facility a facility or program and authority to examine all relevant records and interview any facility or program service recipient, employee, or other person who might have knowledge of the alleged abuse or neglect.
- (2) Pursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of the rights of persons with developmental disabilities people with disabilities.
- (3) Pursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of the rights of individuals with mental illness who are in facilities providing care and treatment, or who have been discharged from such a facility, with respect to matters that occur within 90 days after discharge.
- (4)—Provide information and training on, and referral to, programs and services addressing the needs of persons with developmental disabilities and persons with mental illness people with disabilities, including information and training about individual rights and the services available from the protection and advocacy agency.
- (b) The protection and advocacy agency shall, in addition, have reasonable access to facilities or programs in the state which that provide care and treatment to persons who have developmental disabilities and persons with mental illness—people with disabilities, and access to those persons.—The

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 (1) The protection and advocacy agency shall have reasonable unaccompanied access to public or private facilities, programs, and services, and to recipients of services therein, at all times as are necessary to investigate incidents of abuse and neglect in accord with paragraph (1) of subdivision (a), and shall have access (a). Access shall be afforded, upon request, to the agency when any of the following has occurred:

- (A) An incident is reported or a complaint is made to the agency.
- (B) The agency determines there is probable cause to believe that an incident has or may have occurred.
- (C) The agency determines that there is or may be imminent danger of serious abuse or neglect of an individual with a disability.
- (2) The protection and advocacy agency shall have reasonable unaccompanied access to public and private facilities, programs, and services, and recipients of services therein during normal working hours and visiting hours for other advocacy services in accord with paragraphs (2), (3), and (4) of subdivision (a). In the case of information and training services, access shall be at times mutually agreeable to the protection and advocacy agency and facility management. This access shall be for the purpose of any of the following:
- (A) Providing information and training on, and referral to programs addressing the needs of, individuals with disabilities, and information and training on individual rights and the protection and advocacy services available from the agency, including, but not limited to, the name, address, and telephone number of the protection and advocacy agency.
- (B) Monitoring compliance with respect to the rights and safety of residents or service recipients.
- (C) Inspecting, viewing, and photographing all areas of the facility or program that are used by residents or service recipients, or that are accessible to them.
- (c) Unaccompanied access to residents or service recipients shall include the opportunity to meet and communicate privately with individuals regularly, formally or informally, by telephone, mail, electronic mail, or in person.
- (d) If the protection and advocacy agency's access to facilities, programs, service recipients, residents, or records covered by this

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division is delayed or denied by a facility, program, or service, the facility, program, or service shall promptly provide the agency with a written statement of reasons. In the case of denial of access for alleged lack of authorization, the facility, program, or service shall promptly provide to the agency the name, address, and telephone number of the legal guardian, conservator, or other legal representative of the individual with a disability for whom authorization is required. Access to a facility, program, service recipient, resident, or to records, shall not be delayed or denied without the prompt provision of a written statement of the reasons for the denial.

SEC. 6. Section 4903 of the Welfare and Institutions Code is

SEC. 6. Section 4903 of the Welfare and Institutions Code is amended to read:

- 4903. (a) The protection and advocacy agency shall have access to the records of any of the following persons with developmental disabilities and persons with mental illness people with disabilities:
- (1) Any person who is a client of the agency, or any person who has requested assistance from the agency, if that person, or the legal guardian, conservator, or other legal representative of that person, has authorized the protection and advocacy agency to have access to the records and information.
- (2) Any person, including any individual who is deceased or cannot be located, to whom all of the following conditions apply:
- (A) The individual, due to his or her mental or physical condition, is unable to authorize the protection and advocacy agency to have access to his or her records.
- (B) The individual does not have a legal guardian, conservator, or other legal representative, or the individual's representative is a public entity, including the state *or one of its political subdivisions*.
- (C) The protection and advocacy agency has received a complaint that the individual has been subject to abuse or neglect, or has determined that probable cause exists to believe that the individual has been subject to abuse or neglect.
- (3) Any person who is deceased, and for whom the protection and advocacy agency has received a complaint that the individual had been subjected to abuse or neglect, or for whom the agency has determined that probable cause exists to believe that the individual had been subjected to abuse or neglect.

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(4) Any person who has a legal guardian, conservator, or other legal representative with respect to whom a complaint has been received by the protection and advocacy agency, or with respect to whom the protection and advocacy agency has determined that probable cause exists to believe the health or safety of the individual is in serious and immediate jeopardy that the individual had been subjected to abuse or neglect, whenever all of the following conditions exist:

- (A) The representative has been contacted by the protection and advocacy agency upon receipt of the representative's name and address.
- (B) The protection and advocacy agency has offered assistance to the representatives to resolve the situation.
- (C) The representative has failed or refused to act on behalf of the person.
- (b) Information and Individual records which that shall be available to the protection and advocacy agency under this section shall include, but not be limited to, all of the following information and records obtained in the course of providing intake, assessment, and services:, whether written or in another medium, draft or final, including, but not limited to, handwritten notes, electronic files, photographs, videotapes, or audiotapes:
- (1) Information and records obtained in the course of providing intake, assessment, and services, including reports prepared by any member of the staff of a facility or program rendering care and treatment prepared or received in the course of providing intake, assessment, evaluation, education, training, or other supportive services, including, but not limited to, medical records, financial records, monitoring reports, or other reports, prepared or received by a member of the staff of a facility, program, or service that is providing care, treatment, or services.
- (2) Reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, or injury, or death occurring at the program, facility, or service while the individual with a disability is under the care of a member of the staff of a program, facility, or service, or by or for a program, facility, or service, that describe any or all of the following:
 - (A) Abuse, neglect, or injury occurring at the facility, or death.
 - (B) The steps taken to investigate the incidents.

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(C) Reports and records, including, but not limited to, personnel records, prepared or maintained by the facility, program, or service in connection with reports of incidents.

- (D) Supporting information that was relied upon in creating a report, including, but not limited to, all information and records that document interviews with persons who were interviewed, physical and documentary evidence that was reviewed, or related investigative findings.
 - (3) Discharge planning records.
- (c) Information in the possession of a program, facility, or service that must be available to the agency investigating instances of abuse or neglect pursuant to paragraph (1) of subdivision (a) of Section 4902, whether written or in another medium, draft or final, including, but not limited to, handwritten notes, electronic files, photographs, videotapes, audiotapes, or records, shall include, but not be limited to, all of the following:
- (1) Information in reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for a program, facility, or service by its staff, contractors, or related entities, subject to any other provision of state law protecting records produced by medical care evaluation or peer review committees.
- (2) Information in professional, performance, building, or other safety standards, or demographic and statistical information, relating to the facility.
- (d) The authority of the protection and advocacy agency to have access to records does not supersede any prohibition on discovery specified in Sections 1157 and 1157.6 of the Evidence Code.

(d)

- (e) (1) The protection and advocacy agency shall have access to records of individuals described in paragraph (1) of subdivision (a) of Section 4902 and in subdivision (a), and other records that are relevant to conducting an investigation, under the circumstances described in those subdivisions, not later than three business days after the agency makes a written request for the records involved.
- (2) The protection and advocacy agency shall have immediate access to the records, not later than 24 hours after the agency

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makes a request, without consent from another party, in a situation in which treatment, services, supports, or other assistance is provided to an individual with a disability, if the agency determines there is probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, or in a case of death of an individual with a disability.

- (f) Confidential information kept or obtained by the protection and advocacy agency shall remain confidential and shall may not be subject to disclosure. This subdivision shall not, however, prevent the protection and advocacy agency from doing any of the following:
- (1) Sharing the information with the individual client who is the subject of the record or report or other document, or with his or her legally authorized representative.
- (2) Issuing a public report of the results of an investigation which that maintains the confidentiality of individual service recipients.
- (3) Reporting the results of an investigation to responsible investigative or enforcement agencies should an investigation reveal information concerning the facility, its staff, or employees warranting possible sanctions or corrective action. This information may be reported to agencies that are responsible for facility licensing or accreditation, employee discipline, employee licensing or certification suspension or revocation, or criminal prosecution.
- (4) Pursuing alternative remedies, including the initiation of legal action.
- SEC. 7. Section 4905 of the Welfare and Institutions Code is amended to read:
- 4905. (a) No employee or agent of a facility, or program, or service shall subject a person with developmental disabilities or a person with mental illness a disability to reprisal or harassment or directly or indirectly take or threaten to take any actions which action that would prevent the person, his or her legally authorized representative, or family member from reporting or otherwise bringing to the attention of the protection and advocacy agency any facts or information relative to suspected abuse, neglect, or other violations of his or her the person's rights.
- (b) Any attempt to involuntarily remove from a facility, or program, *or service*, or to deny privileges or rights without good

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cause to a person with developmental disabilities or person with mental illness a disability by whom or for whom a complaint has been made to the protection and advocacy agency, within 60 days after the date the complaint is made or within 60 days after the conclusion of any proceeding resulting from the complaint, shall raise a presumption that the action was taken in retaliation for the filing of the complaint.

SEC. 8. Section 5328.06 of the Welfare and Institutions Code is amended to read:

- 5328.06. (a) Notwithstanding Section 5328, information and records may be disclosed to the protection and advocacy agency established in this state to fulfill the requirements and assurances of the federal Protection and Advocacy for the Mentally Ill Individuals *Amendments* Act of 1986, as amended 1991, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code, for the protection and advocacy of the rights of individuals identified as mentally ill people with mental disabilities, including people with mental illness, as defined in Section—10802(3) 10802(4) of Title 42 of the United States Code.
- 21 (b) Access to information and records to which subdivision (a) applies shall be in accord with Division 4.7 (commencing with Section 4900).